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No. 59494-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Custody of E.A.T.W. and E.Y.W.

VITO & YASUKO GRIECO

Petitioners/Respondents

and

SACHI T. WILSON

Respondent/Moving Party

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Hon. Suzanne Barnett

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

Every day, parents entrust their children's care to family members and friends, sometimes for extended periods of time. An obvious current example is that of American soldiers and sailors called repeatedly to service overseas. Whatever the reasons in a particular case for such arrangements, the parent's status is in no way diminished by these arrangements. Indeed, by arranging for their children's care, parents fulfill their parenting responsibility.

Here, the Griecos call this abdication. Br. Respondent, at 1. They propose that Washington's law on nonparental custody permits a parent to be subjected to a trial on a showing of nothing more than that the children are not in the parent's physical custody. This is the position the Griecos took in the trial court. This is the position the trial court took. This is the issue before this Court on discretionary review. The Griecos and the trial court were wrong about the law, which the Griecos tacitly acknowledge with their untimely and wholly improper effort to "do over" the adequate cause threshold, first in the trial court and now here. These efforts to rewrite the history of this case make a mockery of the facts and the law. The Griecos neither alleged nor proved detriment and cannot turn this proceeding into yet another adequate cause hearing.

B. ISSUES IN REPLY

1. By entrusting the children to the care of their grandparents during a difficult transition, the father responsibly fulfilled the role of parent.

2. The Griecos based their argument for adequate cause on physical custody alone, and the trial court based its adequate cause determination on physical custody alone.

3. Only the trial judge's ruling is before the court on review, since the judge revised the ruling of the family court commissioner, rendering it a nullity.

4. This Court is not a fact-finder and must reject the Griecos' untimely and unavailing effort to establish detriment in this appellate proceeding.

5. A fit parent will be deprived of custody only in extraordinary circumstances upon a substantial showing of actual detriment to the children, not, as the Griecos claim, merely on a showing of best interests.

6. The children, having a fit parent willing and able to care for them, are in "limbo" only so long as the grandparents continue to exile the father from their lives.

7. The August 9 proceeding changes nothing. Wilson hereby incorporates, rather than repeat, arguments made in the Motion to Strike and Reply.

C. ARGUMENT IN REPLY

1. WILSON DID NOT ABDICATE ROLE OF PARENT. RAHTER, THE GRANDPARENTS HAVE KEPT THE FATHER FROM THE CHILDREN.

The Wilson-Grieco marriage was troubled long before Grieco's cancer recurred. CP 73-74. Grieco discussed her marital discontent with her parents, rather than with Wilson, and, over time, her parents' and her own antipathies toward Wilson together grew. CP 74-75. Wilson left the marriage, but always intended to continue to be an involved parent. CP 76. Grieco, abetted by her parents, who moved in with her and were furious with Wilson, obstructed that effort. CP 76.

In 2003, Wilson filed for divorce. CP 77. However, in respect of Grieco's illness, Wilson ceased the effort to formalize the dissolution of their marriage, meaning, of course, that no parenting plan was ever instated. CP 76-77. The following year, in the face of the Griecos' hostilty, and the fear that they would again obstruct access to the boys, Wilson again filed for divorce. CP 78. Not long after, Grieco died. CP 78. Wilson again accommodated this harsh

reality, acceding to pressure from the Griecos, and agreed not to further disrupt the children's lives in the immediate aftermath of their mother's death. CP 78-79. Indeed, Wilson took measures appropriate to ensuring that the children were fully protected while in the care of their grandparents, authorizing the Griecos to act in loco parentis. CP 10-11, 13-14, 16-20. However, the Griecos continued to obstruct Wilson's relationship with the children. CP 79-880. Whatever the Griecos' own feelings about Wilson, the fact remains that Wilson is the boys' father. The Griecos have no right to continue, as they have in the past, to thwart Wilson's fulfillment of that role.

2. THE GRIECOS RELIED ON PHYSICAL CUSTODY AS THE BASIS FOR ADEQUATE CAUSE AND THE JUDGE AGREED THAT PHYSICAL CUSTODY ALONE SATISFIED THE ADEQUATE CAUSE REQUIREMENT.

The Griecos' petition makes two allegations in support of adequate cause for nonparental custody: that the children are not in the physical custody of their parents and that the parties agreed that the children should reside with the Griecos. CP 4. Their Motion and Declaration in support of adequate cause does the same. CP 21-24.

The Griecos argued to the trial court that the fact that the children are not in the physical custody of either parent "alone is sufficient adequate cause for the third party custody action to go forward." CP 50 (emphasis added).[1] The court agreed with them, ruling that the:

> Court only needs to find, under 26.10, that children are not in the custody of parents to find adequate cause.

CP 60-61 (emphasis added). This was the sole basis for the court's adequate cause determination. Nowhere in the four corners of the court's order is any other basis given. This order is erroneous because the nonparental custody statute now includes a substantive threshold. See Br. Appellant, at 6-12. Because, in entering the order, the court misinterpreted the statute, this Court reviews the ruling *de novo,* not for an abuse of discretion, as the Griecos contend. See Br. Respondent, at 9-11. ***Cerillo v. Esparza,*** 158 Wn.2d 194, 199,142 P.3d 155 (2006) (questions of statutory interpretation reviewed de novo).

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[1] The Griecos also argued that Wilson is not a "suitable custodian" because Wilson left the children in the Griecos' care. CP 50. The trial court did not agree. ***See In re Marriage of Olivares,*** 69 Wn. App. 324, 334, 848 P.2d 1281 (1993) (**absence** of a finding in favor of the party having the burden of proof on a disputed material fact is normally interpreted as a **negative finding** against that party).

3. THE JUDGE'S ORDER, NOT THAT OF THE FAMILY COURT COMMISSIONER, IS THE ONLY VALID ORDER AND THE ORDER UNDER REVIEW.

This Court accepted review of the trial court's order, meaning the appellate court commissioner found that the judge's ruling was in obvious error. ***See*** RAP 2.3(1) ("[t]he superior court has committed an obvious error which would render further proceedings useless;..."). A panel denied the Griecos' motion to modify. Subsequently, eight months after the deadline for the adequate cause determination, and despite having prevailed in the trial court, the Griecos filed in the trial court a "Supplemental Motion and Declaration for Adequate Cause," which made new allegations of fact and which asked the court to rule <u>again</u> on the adequate cause question. CP 84 et seq. Wilson objected to the multiple improprieties of this action and the family court commissioner struck the Griecos' motion as untimely. Id. The judge declined to revise that ruling and added that "it's inappropriate now that that is before the Court of Appeals to say, oh, you know, you get a do-over and we'll broaden what the procedural – we'll broaden the basis for purposes of the appeal." August 9 RP 18.

Yet, the Griecos attempt to use statements the judge made at the revision hearing to resurrect the family court commissioner's

original adequate cause order, which included a finding that it would be detrimental to remove the children from the grandparents (solely because of the passage of time). See, e.g., Br. Respondent, at 11, 14, 16. However, the law is clear that the commissioner's ruling, having been revised by the superior court judge, effectively ceased to exist. ***In re Marriage of Dodd,*** 120 Wn. App. 638, 644, 86 P.3d 801 (2004) (orders entered by the judge supersede those of the family court commissioner). Once the judge enters an order, this Court will "review the superior court's ruling, not the commissioner's." ***State v. Ramer,*** 151 Wn.2d 106, 113, 86 P.3d 132 (2004). To have this effect, the judge's order does not need to reach a different result than did the commissioner's, as the Griecos contend. Br. Respondent, at 14. There is no authority for this proposition and the Griecos cite none. In any case, the judge here, though reaching the same result as the commissioner, did so for different reasons, entering a separate and different order than the commissioner entered. "Once the superior court makes a decision on revision, the appeal is from the superior court's decision, not the commissioner's." ***Ramer,*** 151 Wn.2d at 113.

The rule the Griecos propose, that both orders would somehow coexist, not only lacks authority, it would lead to confusion—not only in general, but in this particular case. Here, the court commissioner found one basis for adequate case and the trial judge another. The judge based adequate cause entirely on physical custody, while the commissioner found adequate cause on the basis of physical custody and the detriment of removing the children. Compare CP 53 and 60. In fact, the judge expressly found it was not possible, on affidavits alone, to make the finding the court commissioner made, but that a trial was needed. CP 61 ("Court cannot determine issues based on written materials; trial is necessary."). Thus, it is another of the Griecos' fictions that somehow these two disparate rulings can be harmonized.[2]

If the judge meant to embrace the court commissioner's finding, she could have done so by including that finding in the judge's written order. It was not included because it is at odds with the judge's own ruling, as the judge on August 9 acknowledged.

> And my ruling was that the statute reads in the alternative, that the children have been out of their parents' custody and in the – in the custody of their grandparents, and that <u>whether a move would be</u>

[2] This fiction extends to the assertion that "the trial court properly considered the potential detriment to the children ..." Br. Respondent, at 15. In fact, the court postponed that consideration to trial.

> detrimental is a finding of fact and that I could not make that finding on the basis of competing affidavits. That is the ultimate issue for trial.
>
> I stand by that ruling.

August 9 RP, at 20-21 (emphasis added). It is clear from the judge's written order that she did not find detriment and believed she could not find detriment without a trial. Her statements eight months later simply confirm that she meant what she said in the order, which, again, is completely at odds with the commissioner's order.

4. THE GRIECOS CANNOT NOW ARGUE DETRIMENT AS A BASIS FOR ADEQUATE CAUSE.

Unperturbed by the facts of this case, including the facts of their own actions below, the Griecos now try to persuade this Court to find adequate cause based on detriment. See, e.g., Br. Respondent, at 21-23. That is, having prevailed once on adequate cause, arguing they needed only to prove they had physical custody, and having failed in their untimely effort to "do over" the threshold determination, the Griecos now try to turn this appellate proceeding into an adequate cause hearing. It would be hard to list all of the ways this effort is improper, but that list includes due process and fundamental fairness. More simply, this Court is not a fact-finder (let alone a star chamber). ***See State ex rel. Lige &***

Wm. B. Dickson Co. v. County of Pierce, 65 Wn. App. 614, 618, 829 P.2 217 (1992) (appellate court is not a fact-finding branch of the judicial system). The Griecos failed to allege or to prove detriment in the trial court. The trial court has told them they do not get a second bite at the apple. Certainly, they do not get a third bite in this Court.

5. THE FACT THAT THE CHILDREN ARE NOT IN THE PARENT'S CUSTODY DOES NOT ALTER THE SUBSTANTIVE TEST FOR NONPARENTAL CUSTODY.

The Griecos also argue that, where the children are not in the parent's physical custody, third party petitioners will prevail if they demonstrate "only that awarding them custody is in the best interests of the child." Br. Respondent, at 20-21. This argument is plainly wrong. Indeed, this proposed lower standard cannot be squared either with the statute, the case law, or with the constitution. ***In re Custody of Shields,*** 157 Wn.2d 126, 136 P.2d 117 (2006). The Supreme Court in ***Shields*** reiterated that, as between a fit parent and a nonparent, custody will be granted the nonparent only in "extraordinary circumstances" that include a "substantial" showing of "actual detriment" to the children if they are placed with their parent. 157 Wn.2d at 145.

In short, there is no support in Washington law for the rule proposed by the Griecos, which effectively treats the children as some kind of football and the contest over them as turning on possession, rather than law. This rule would apply to all cases where parents "voluntarily relinquish custody" (Br. Respondent, at 21), which would cover almost everything but kidnapping. Parents commonly rely on nonparental caregivers. In doing so, they do not relinquish legal custody or otherwise diminish their rights or their responsibilities.

6. THE CHILDREN HAVE A FIT PARENT AND ARE AT NO RISK OF FINDING THEMSELVES IN A "LEGAL LIMBO."

The children have a parent willing and able to care for them. That the father has been flexible and accommodating does not change the fact that the Griecos have no legal right to either the custody or control of the children. Affirming the father's right, as this Court must, does not leave the children in legal limbo. See Br. Respondent, at 24-25. In fact, contrary to the Griecos' assertion, it is the current circumstances that are untenable, since the father is exiled from the children's lives. The grandparents have no right to do this.

D. CONCLUSION

For the foregoing reasons, Wilson again asks this Court to reverse the ruling of the trial judge and to order the nonparental custody petition dismissed for lack of adequate cause.

Dated this 19th day of October 2007.

RESPECTFULLY SUBMITTED,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Custody of Elliot A. T. Wilson and Evan Y. Wilson	)	
VITO & YASUKO GRIECO, Petitioners,	)	No. 59494-0-I
and	)	DECLARATION OF SERVICE
SACHI T. WILSON, Respondent.	)	

Patricia Novotny certifies as follows:

On October 19th, 2007, I served upon the following true and correct copies of the Reply Brief and Motion to File Reply Brief and this Declaration, by:

☐email (by Patricia Novotny with the consent of opposing counsel)
☒depositing same with the United States Postal Service, postage paid
☐arranging for delivery by messenger.

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I certify under penalty of perjury that the foregoing is true and correct.

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